IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 2, 2009 Session

WANDA F. DYKES, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF RONALD DYKES, BY AND THROUGH WANDA F. DYKES v. THE CITY OF ONEIDA ET AL.

Appeal from the Circuit Court for Scott County
No. 7157 John D. McAfee, Judge

No. E2009-00717-COA-R3-CV - FILED FEBRUARY 26, 2010

In this action, Wanda F. Dykes ("the plaintiff") filed suit against the City of Oneida ("the defendant") for the alleged wrongful death of her husband, Ronald Dykes. Her claim is based upon her allegation that police officers employed by the defendant were negligent in not calling for medical help when they responded to a call and found Ronald Dykes asleep and unresponsive in his home. They left him as they found him without calling for medical assistance. Mr. Dykes was found the next morning dead of a heart attack in the same recliner where the officers found him. The thrust of the complaint is that, had the officers summoned medical help, Mr. Dykes' heart attack and resulting death could have been prevented. The defendant moved for summary judgment asserting, among other things, that the plaintiff cannot prove her theory of causation. While the motion was pending, the trial court, on four separate occasions, continued the hearing with respect to it, in order to give the plaintiff an opportunity to find and produce an expert to make out her case. When the motion was finally heard, the record contained the affidavit of a medical doctor stating that the failure of the officers to seek medical treatment for Mr. Dykes "may have allowed his condition to worsen and cause his death." The record also contained the same doctor's deposition testimony wherein he testified that he could not say Mr. Dykes would have survived if he had received prompt medical attention. The trial court granted the defendant summary judgment. The plaintiff appeals. We vacate the trial court's grant of summary judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Brandon K. Fisher, Clinton, Tennessee, for the appellant, Wanda F. Dykes.

Benjamin K. Lauderback and Sarah E. Larkin, Knoxville, Tennessee, for the appellee, The City of Oneida.

OPINION

I.

Ronald Dykes was found dead in his home in Oneida during the late morning hours of September 27, 2006. The day before, he visited his wife, Wanda, the plaintiff, who was a patient at Methodist Medical Center in Oak Ridge. He left the hospital to return home in the evening of the 26th, but did not respond to the plaintiff's telephone calls made between 6:30 and 7:00 p.m. that night. The plaintiff called a family friend, Ms. Byrd, and asked her to check on Mr. Dykes. Ms. Byrd found the door to the Dykes' home unlocked and called for police assistance.

Two City of Oneida officers responded and entered the home ahead of Ms. Byrd. They called out Mr. Dykes' name and got no response. They heard "snoring" and found Mr. Dykes lying in a recliner. They shined a flashlight in his face and called his name but Mr. Dykes did not respond. He continued snoring. They saw his chest rising and falling as he breathed. Although there is some conflict in the testimony, there is evidence to support an inference that either one of the officers or Ms. Byrd shook Mr. Dykes and he still failed to respond. The officers were aware that Mr. Dykes had been spending time that day with his wife at the hospital and surmised that he was just tired from that experience. They left Mr. Dykes as they found him.

The next morning, Ms. Bryd took the plaintiff's father with her to check on Mr. Dykes. They found him dead in the same position he had been in the night before. His death certificate lists the cause of death as a myocardial infarction, *i.e.*, a heart attack. Although the responding officers did not know it, Mr. Dykes had a history of heart problems, including numerous heart attacks.

After the case had been pending for approximately 18 months, and after the depositions of the officers and Ms. Byrd had been taken, the defendant filed a motion to dismiss or for summary judgment. One of the grounds for the motion was stated as follows:

> . . . the Plaintiff[] cannot prove the required causal connection between the death of Mr. Dykes and the actions or inactions of

> the Defendants,[1] nor can the Plaintiff[] prove there was any duty of care owed or breached by these Defendants.

(Footnote added.) Initially, the defendant did not include any medical proof, other than the death certificate, with or in support of its motion. Despite the fact the defendant did not support its motion with medical proof regarding causation,[2] the trial court, after a hearing, ordered the plaintiff "to locate and identify competent proof establishing a causal link between the undisputed death of Mr. Dykes occurring on September 27, 2006 and the officers seeing him in his home asleep on September 26, 2007." In other words, the trial court required the plaintiff to respond to a summary judgment motion containing no expert evidence showing that the officers' conduct did not cause or contribute to Mr. Dykes' death.

When the matter next came before the trial court, the plaintiff had filed the affidavit of a first responder which stated, in essence, that the officers should have summoned emergency medical help. The trial court apparently determined the first responder did not address causation. The court again continued the motion to a date certain to allow the plaintiff an opportunity to "locate and identify competent medical proof from a licensed medical professional who can establish a causal link . . . ."

The plaintiff filed the affidavit of Charles S. Perry, M.D., which states that "[t]he failure of emergency response personnel to seek medical assistance for Mr. Dykes may have allowed his condition to worsen and cause his death." The trial court again continued the hearing to allow the plaintiff to take Dr. Perry's deposition. On direct examination in his deposition, Dr. Perry testified that Mr. Dykes was probably in medical distress when the officers arrived, that, as first responders, they should have called for emergency assistance, and that treatments were available "in an emergency room setting that could have potentially alleviated this or certainly improved its outcome." The following exchange transpired between defense counsel and Dr. Perry:

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[1]Between the filing of the complaint and the entry of summary judgment, other defendants in the case were dismissed by an agreed order.

[2]We recognize that, under Tenn. R. Civ. P. 56.02, a party may move for summary judgment "without supporting affidavits." That is not the point. The cogent point is that a defense motion for summary judgment, without more, does not shift the burden of production to the plaintiff. A plaintiff is not legally bound to do anything in response to an unsupported motion for summary judgment. In the instant case, the defendant's motion was unsupported in the sense that there was no expert testimony establishing the negative of the plaintiff's claim of causation.

Q You can't say, within a reasonable degree of medical certainty, had medical intervention taken place whether Mr. Dykes would have survived or not?

A Cannot say that.

* * *

Q What proof do you have that had the officers woken Mr. Dykes up that evening that he still would not have died of a myocardial infarction? I think we have answered that about three times but this again is Judge McAfee's question.

A Sure, that's okay. I don't have any proof that had they awakened him and assessed that . . . . his well being was okay, I don't have any proof that that would have prevented his death.

* * *

Q . . . . Can you say, within a reasonable degree of medical certainty, that but for these officers' seeking medical help Mr. Dykes would have survived?

A I cannot say that because I don't know the degree of the myocardial infarction.

* * *

Q So you can't say if he would have lived, you can't say if he would have died?

A That's right.

Q Right there at fifty percent?

A You know, it is hard to say. He got no treatment. Would treatment have mattered? You know, you just don't know. You can't say one way or the other, not with any degree, and I don't think a cardiologist could tell you that with certainty.

After hearing argument on February 10, 2009, the trial court granted summary judgment. The court's order states, in part, as follows:

> This Court specifically finds that essential elements of the Plaintiffs' claims have been negated through the record as a whole, including, but not limited to, testimony provided by Dr. Perry and the death certificate. This Court finds that the only proof in the record is that Mr. Dykes died of a myocardial infarction on September 27, 2006. This Court finds that the evidence established through the record shows that Mr. Dykes was viewed by employees of the City of Oneida sleeping in his own home on September 26, 2006. The proof established through the testimony of Dr. Perry, retained by the plaintiff to support her claims, is that even if the employees had awoken Mr. Dykes in his own home where he was sleeping during the early evening hours of September 26, 2006 there is no evidence that his death that occurred the next day would have been prevented. The essential elements of causation and proximate cause have been negated by the defendants. The plaintiff failed to come forth with proof to support her claim after the defendants successfully negated essential elements of her case. As a matter of law summary judgment is appropriate and is granted.

II.

The plaintiff raises one issue on appeal

> Whether the trail court erred in granting defendants' motion for summary judgment because the defendants had not affirmatively negated an essential element of the plaintiffs' claim.

III.

Recent statements by the Supreme Court with respect to the law applicable to summary judgment motions and our standard of review are as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord* ***Penley v. Honda Motor Co.***, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* ***Staples v. CBL & Assocs., Inc.***, 15 S.W.3d 83, 88 (Tenn. 2000); ***McCarley v. W. Quality Food Serv.***, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." ***McCarley***, 960 S.W.2d at 588; *accord* ***Staples***, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. ***Hannan v. Alltel Publ'g Co.***, 270 S.W.3d 1, 5 (Tenn. 2008); *see also* ***McCarley***, 960 S.W.2d at 588; ***Byrd***, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. ***Byrd***, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. ***McCarley***, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. ***Hannan***, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See* ***Blair v. W. Town Mall***, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to

> make the required showing, then its motion for summary judgment will fail. ***Byrd***, 847 S.W.2d at 215.
>
> If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. ***McCarley***, 960 S.W.2d at 588; ***Byrd***, 847 S.W.2d at 215. . . . The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. ***McCarley***, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." ***Byrd***, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." ***Id.***
>
> Because the resolution of a motion for summary judgment is a matter of law, we review the trial court's judgment de novo with no presumption of correctness. ***Blair***, 130 S.W.3d at 763. In addition, we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party. ***Staples***, 15 S.W.3d at 89.

Martin v. Norfolk Southern Ry. Co., 271 S.W.3d 76, 83-84 (Tenn. 2008).

IV.

The plaintiff argues that the testimony of Dr. Perry relied upon by the defendant, as well as by the trial court in granting summary judgment, did not meet the burden – placed on movants by ***Hannan*** – of negating, or showing that the nonmovant cannot prove, an essential element of its claim. She argues that the defendant persuaded the trial court to apply the "put up or shut up" rule followed in federal practice. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325, 106 S.Ct. 2458 (1986); ***Street v. J. C. Bradford & Co.***, 886 F.2d. 1472, 1478 (6th Cir. 1989). The plaintiff is correct that the Tennessee Supreme Court has rejected the idea that summary judgment can be based on a challenge to the opponent to "put up or shut up." ***Hannen***, 270 S.W.3d at 8. A moving party who seeks to shift the burden of production to a nomoving party "who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party

cannot prove an essential element of the claim at trial." ***Id***. at 9 (footnote omitted). The plaintiff argues that the defendant did neither.

The defendant argues that the plaintiff simply "chooses to ignore the clear evidence . . . in the record." The defendant argues that the medical records of Mr. Dykes and his 11 previous heart attacks tend to show that he would have died regardless of what the officers did or did not do. We disagree. We acknowledge that those records do clearly show that he was in poor health and susceptible to further problems; but they do not prove that he still would have died even had he received prompt emergency attention on the 26th of September. While Dr. Perry testified that he could not say that prompt emergency attention would have prevented a fatal heart attack, he did *not* affirmatively testify that prompt medical attention would not have prevented such an attack. Had he done so, this would have amounted to a "negating" of plaintiff's allegation to the contrary.

The defendant also argues that the evidence shows that Mr. Dykes was simply tired and in a deep sleep, or at least that is what the officers thought. There are two problems with this argument. First, Dr. Perry testified that, in his professional medical opinion, it was more probable than not that Mr. Dykes was in distress when the officers were present. The second problem is that we must allow all reasonable inferences against the defendant at this summary judgment stage in the proceedings. Regardless of what these officers thought, a jury could reasonably draw the conclusion that a reasonable first responder would have called for additional medical attention. Thus, the real issue in the case is whether the failure to summon emergency assistance would have made a difference.

Primarily, the defendant argues that the testimony of Dr. Perry conclusively shows "that the Plaintiffs could not establish essential elements of their claim, namely cause in fact and proximate cause." Plaintiff argues that all the defendant did was call the proof of causation into question and did not negate any essential element any more than did the defendant in ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585 (Tenn. 1998). The defendant argues that ***McCarley*** is not dispositive because it simply involved a second possible alternative cause of contaminated bacon versus contaminated chicken. The defendant's reading of ***McCarley*** is more restrictive than the reading adopted by the Supreme Court, as shown by its remarks in ***Hannan***:

> The plaintiff [in ***McCarley***] had tested neither the bacon nor the chicken for bacteria, and the plaintiff's doctor was unable to pinpoint the cause of the food poisoning. The restaurant's motion asserted that the plaintiff would be unable to prove causation at trial. . . . The trial court granted summary judgment. On appeal, this Court held that although the restaurant "cause[d]

> doubt" as to the causation of the plaintiff's illness, it failed to negate an essential element of the plaintiff's claim. ***Id.***

Hannan, 270 S.W.3d at 7. According to ***Hannan***, ***McCarley*** supports the following proposition: the showing that a party may not yet, at the summary judgment stage, be able to prove an element of the case does not mean that an element has been negated or that proof of the element will be missing at the time of trial. ***Id.*** at 8. Based on that proposition, the Court held in ***Hannan*** that (1) a party's admission that she could not quantify her damages and (2) tax returns indicating that the Hannans made more money in the year they were allegedly harmed than in the previous year, did not carry the burden of affirmatively showing the Hannans could not prove damages at trial. ***Id.*** at 10-11.

In ***Madison v. Love***, No. E2000-01692-COA-RM-CV, 2000 WL 1036362 (Tenn. Ct. App. E.S., filed July 28, 2000)(***Madison II***) we reversed a summary judgment granted by a trial court in a wrongful death case. The case first came before us in ***Madison v. Love***, No. 03A01-9903-CV-00069, 1999 WL 1068706 (Tenn. Ct. App. E.S., filed Nov. 24, 1999)(***Madison I***). In that earlier review by us, we affirmed the trial court's grant of summary judgment. In granting summary judgment, the trial court had based its decision on the fact that the pathologist who performed an autopsy on the decedent stated that he "did not know what caused [the decedent's] death." ***Id.*** at *1. The Supreme Court then entered an order granting permission to appeal and, without further briefing or argument and in the same order, remanded the case to our court "to decide the case . . . in accordance with . . . ***McCarley v. West Quality Food Service***, 960 S.W.2d 585 [(Tenn. 1998)]." ***Madison II***, at *1 (brackets in ***Madison II***). Upon considering ***McCarley***, we held as follows:

> While it is clear that Dr. McCormick's affidavit casts doubt upon the plaintiff's ability to prove causation, that affidavit does not do enough. It does not *negate* the plaintiff's claim of causation in a way that would trigger the plaintiff's burden to produce countervailing material. *In order to negate the element of causation, the defendants would have had to present admissible competent testimony that the defendants' failure to render aid did not cause or contribute to the death of the plaintiff's decedent. The affidavit, with its cause-of-death-is-unknown language is not the same.*
>
> . . . . In the instant case, the plaintiff was not required to respond to the defendants' motion since the defendants' supporting material did not conclusively negate an essential

> element of the plaintiff's cause of action. Therefore, we conclude summary judgment was and is inappropriate.

Madison II, at *2 (the word "negate" is italicized in original; other emphasis added).

The testimony of Dr. Perry does no more than the pathologist's affidavit in ***Madison II***; the doctor's testimony in the instant case shows that he does not know whether the officers' failure to summon medical assistance was a factor in Mr. Dykes' demise. That testimony does *not* amount to an opinion that the officers' failure to act *did not* play a role in Mr. Dykes' death. The evidence relied upon by the defendant and the trial court does not negate the plaintiff's theory that the officers' failure to act contributed to Mr. Dykes' death. Since the element of causation was not negated, the plaintiff was under no obligation to present proof, at the summary judgment stage, that the failure to act caused or contributed to Mr. Dykes' death. *See* ***McCarley***, 960 S.W.2d at 588.

The trial court, as previously noted, held that summary judgment was appropriate because the plaintiff failed to come forward with countervailing evidence when the "essential elements of causation and proximate cause ha[d] been negated by the defendants." The defendant invites us to affirm on an alternative ground. It points to the fact that the plaintiff was granted four continuances and, as a consequence of this, should not be heard to complain about losing on the defendant's motion. While the defendant does not specifically allude to the alternative holding of ***Hannan***, *i.e.*, that summary judgment is appropriate if the moving party "show[es] that the nonmoving party cannot prove an essential element of the claim at trial," *see* ***Hannan***, 270 S.W.3d at 7, his arguments on his alternate ground seems to be based upon the above-quoted language in ***Hannan***.

The facts of the instant case do not bring it within the ambit of the subject ***Hannan*** language. In that connection, it is important to point out that, while the plaintiff failed to come forward with a causation expert after four continuances of the motion hearing, there is no scheduling order in this case that would preclude the plaintiff from going forward with its case. For this reason, the litigation now before us is distinguishable from the situation where a trial court has entered a general scheduling order pursuant to Tenn. R. Civ. P. 16 setting deadlines for the completion of discovery and disclosure of experts by the parties. In a case involving that specific scenario, we affirmed a summary judgment against a party whose only expert disclosed within the deadline set by the scheduling order could not meet the party's burden of proof on an essential element. ***McDaniel v. Rustom***, No. W2008-00674-COA-R3-CV, 2009 WL 1211335 at *15 & n.6 (Tenn. Ct. App. W.S. filed May 5, 2009). The reason was that "when [the defendant] Dr. Rustom demonstrated that [McDaniel] could not establish an essential element of their case with the testimony of Dr. Marks, she also demonstrated that [McDaniel] could not prove an essential element of their claim at trial

because Dr. Marks was the only medical expert identified by [McDaniel] in accordance with the deadlines imposed by the trial court's scheduling orders." ***Id***. at n.6. As we noted, there is no such scheduling order in the case now before us.

The lack of a general scheduling order is an important distinction. In the absence of such an order, or an order of similar meaning, the plaintiff was under no obligation to "show its hand" to the court by disclosing its proof in the record. Every order entered in this case, by our reading, was entered based upon the mistaken belief that the defendant, with its motion, had successfully negated an essential element of the plaintiff's case and thereby shifted the burden of production to the plaintiff. We have previously concluded that was not the case. While we empathize with trial courts dealing with motions for summary judgment, and with this trial court in particular in light of the careful and patient consideration it gave this case, we are simply unwilling and unable to sustain a summary judgment based on a deadline artificially imposed by a mistaken premise.[3]

The defendant also argues that other elements of the plaintiff's cause of action, *i.e.*, duty and breach, have been negated. We have considered these arguments and we respectfully disagree with them. The record before us, at this summary judgment juncture, contains proof of duty and breach. The proof and permissible inferences establish questions for a trier of fact on these elements.

V.

The judgment of the trial court is vacated. Costs on appeal are taxed to the appellee, The City of Oneida. This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE

[3]We do not mean to suggest that a party is at liberty to ignore an order that is based upon a mistaken premise. Generally speaking, all court orders must be obeyed. A party ignores a court order at its peril. In the instant case, the plaintiff attempted to comply with the court's order. Our holding today simply stands for the proposition that, in a summary judgment setting, the inability of a party to produce an expert under the facts of this case is not fatal to the plaintiff's attempt to defeat a summary judgment request.